

NO. 42886-5-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

JOHN M. LUNDY,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Thomas McPhee, Judge  
Cause No. 09-1-00576-5

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BRIEF OF APPELLANT

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THOMAS E. DOYLE, WSBA NO. 10634  
Attorney for Appellant

P.O. Box 510  
Hansville, WA 98340  
(360) 638-2106

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in finding that Lundy had the current or future ability to pay legal financial obligations (LFOs).
02. It was error in permitting Lundy to be represented by counsel who provided ineffective assistance by failing to argue in Lundy's first appeal that the trial court erred in finding that Lundy had the current or future ability to pay legal financial obligations (LFOs).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court, sans an inquiry into Lundy's individual financial circumstances, erred in finding that he had the current or future ability to pay legal financial obligations? [Assignment of Error No. 1].
02. Whether it was error in permitting Lundy to be represented by counsel who provided ineffective assistance by failing to argue in his Lundy's first appeal that the trial court erred in finding that Lundy had the current or future ability to pay legal financial obligations (LFOs)? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

On February 4, 2010, John M. Lundy (Lundy) was sentenced following his jury convictions for possession of a stolen vehicle, two counts of unlawfully issuing bank checks and two counts of bail jumping. [CP 19-29]. The court imposed an exceptional sentence of 70

months for the stolen vehicle offense under RCW 9.94A.535(2)(b) and (c), to be served currently with the remaining four convictions. [CP 61].

In Lundy's first appeal, this court affirmed his convictions, struck one of the two reasons the trial court relied on to justify the exceptional sentence, and remanded for the sentencing court to reconsider the exceptional sentence, given that it was not clear from the record whether the sentencing court would have imposed the same exceptional sentence based solely on RCW 9.94A.535(2)(c). State v. Lundy, 162 Wn. App. 865, 256 P.3d 466 (2011).

At resentencing, the trial court, in addition to imposing \$1,947.82 in legal financial obligations (LFOs), which included \$554.53 in restitution [CP 60], sentenced Lundy to the same exceptional sentence:

I agree that my sentencing initially was based solely upon subsection 2(c) of the sentencing statute, 9.9A.535 (sic)....

I find no basis for changing my sentence, and I'm going to impose the 70 months....

[RP 13].

Although there was no discussion of Lundy's financial resources, the judgment and sentence included the following written finding on the preprinted form:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial

resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

[CP 59].

Lundy was found indigent for purposes of this appeal. [CP 89-92].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN FINDING THAT LUNDY HAD THE CURRENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

When entering a finding regarding a defendant's ability to pay LFOs, a sentencing court must first consider the defendant's financial circumstances and the burden of imposing the obligations. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

A trial court's decision vis-à-vis a defendant's ability to pay LFOs is reviewed under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04 (citing Baldwin, 63 Wn. App. at 312). At minimum, the record must establish the sentencing court at least considered the defendant's financial circumstances and the burden imposed by ordering payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12). A trial court's failure to exercise discretion in sentencing is

reversible error. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Such error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); see also State v. Ford 137 Wn.2d 472, 477, 973 P.2d 452 (1999) (unlawful sentence may be raised for first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the sentencing court's finding that Lundy had the current or future ability to pay his LFOs. And given Lundy's extensive record, length of exceptional sentence (70 months) and indigent stratus, the record suggests the opposite is true. [CP 58-59, 89-92].

The sentencing court's finding that Lundy had the current or future ability to pay his LFOs was clearly erroneous and must be stricken. Moreover, before the State can collect LFOs from Lundy, "there must be a determination that (he) has the ability to pay these LFOs, taking into account (his) resources and the nature of the financial burden on (him)." Bertrand, 165 Wn. App. at 405 n.16.

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02. LUNDY WAS PREJUDICED BY HIS  
COUNSEL’S FAILURE TO ARGUE IN  
HIS FIRST APPEAL THAT THE TRIAL  
COURT ERRED IN FINDING THAT  
LUNDY HAD THE CURRENT OR FUTURE  
ABILITY TO PAY LEGAL FINANCIAL  
OBLIGATIONS.<sup>1</sup>

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

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<sup>1</sup> Given that the trial court revisited the LFOs on remand by adjusting the amount owed [RP 13], Lundy is not precluded from raising the issue in the preceding section of this brief. See State v. Barberio, 121 Wn.2d 48, 50, 846 P.2d 48 (1993); State v. Corrado, 94 Wn. App. 228, 236, 972 P.2d 515, review denied, 138 Wn.2d 1011 (1999). This portion of the brief is presented out of an abundance of caution should this court disagree with this assessment.

Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court determine that Lundy waived this issue by failing to address it in his initial appeal, then both elements of ineffective assistance have been established. First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to argue that the trial court had failed to properly consider Lundy's financial circumstances before entering the LFOs. Second, the prejudice is self-evident. As set forth in the preceding section, had counsel in the initial appeal argued that the LFOs must be stricken for the trial court's failure to properly consider Lundy's financial circumstances, the finding

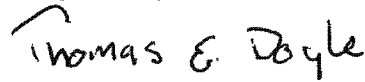
that Lundy had the current or future ability to pay LFOs would have been stricken.

E. CONCLUSION

Based on the above, this court should remand with an order that the trial court strike the unsupported finding that Lundy has the current or future ability to pay legal or financial obligations.

DATED this 13<sup>th</sup> day of April 2012.

Respectfully submitted,

A handwritten signature in black ink that reads "Thomas E. Doyle". The signature is written in a cursive, slightly slanted style.

THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

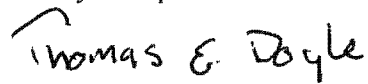
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne  
paoappeals@co.thurston.wa.us

John M. Lundy #725019  
S.C.C.C.  
191 Constantine Way  
Aberdeen, WA 98520

DATED this 13<sup>th</sup> day of April 2012.

A handwritten signature in black ink that reads "Thomas E. Doyle". The signature is written in a cursive style with a large initial 'T'.

THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

# DOYLE LAW OFFICE

**April 13, 2012 - 4:41 PM**

## Transmittal Letter

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